Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-891

EDGAR PAUL, Chief of Police, Louisville Division of Police, and
RUSSELL McDANIEL, Chief of Police, Jefferson County Division of Police - Petitioners

versus

EDWARD CHARLES DAVIS, III - - Respondent

PETITION FOR WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

EDGAR PAUL, Chief of Police, Louisville Division of Police, and
RUSSELL MCDANIEL, Chief of Police, Jefferson County Division of Police - *Petitioners*

v.

EDWARD CHARLES DAVIS, III - - *Respondent*

PETITION FOR WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on October 22, 1974.

OPINION BELOW

The opinion of the Court of Appeals reversed the judgment of the United States District Court for the Western District of Kentucky, and held that the distribution by the Petitioners to a group of local merchants of a flyer captioned "Active Shoplifters" and

containing the name of the Respondent, who had been arrested but not convicted of the crime of shoplifting, was a violation of the Due Process Clause of the Fourteenth Amendment.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 22, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Did the Court of Appeals below err in reversing the judgment of the District Court below and in holding that the distribution by the Petitioners of a flyer for the use and protection of local merchants and business establishments entitled "Active Shoplifters" and containing the identity of the Respondent, who had been charged with, but not convicted of, the crime of shoplifting, was of such grave magnitude as to constitute an invasion of the civil rights secured to the Respondent under the Constitution and to require the invocation of Federal jurisdiction in accordance with 42 U.S.C. Section 1983?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment IV

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment IX

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment XIV, Section 1

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

STATUTES INVOLVED

42 U.S.C. Section 1983

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. Section 1343

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

28 U.S.C. Section 2201

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other relation of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. Section 2202

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

STATEMENT OF THE CASE

The Respondent, Edward Charles Davis III, filed suit on December 13, 1972, in the United States District Court for the Western District of Kentucky under 28 U.S.C. Sections 1343(3) (4), 2201, and 2202, and 42 U.S.C. Section 1983, alleging a deprivation of his civil rights in general and violation of his right of privacy specifically. The Respondent's suit was brought

against the Petitioners, Edgar Paul, who was Chief of Police of the Louisville Division of Police at the time the Respondent's claim arose, and Russell McDaniel, who was the Chief of Police of the Jefferson County Police Department both at the time the Respondent's claim arose and presently.

The Respondent was arrested on June 14, 1971, by private security officers and charged with a violation of Kentucky Revised Statutes 433.234, Shoplifting. On September 21, 1971, the case against the Respondent was "filed away with leave". On December 11, 1972, nearly nineteen (19) months after the case was filed away, the Respondent's case in Police Court was dismissed.

On or about December 5, 1972, the Petitioners authorized the preparation and dissemination to certain local merchants and business establishments in Jefferson County, Kentucky, a flyer containing names and photographs of persons suspected of being active shoplifters in the area. The purpose of the flyer was not to inform the public at large, but rather to alert local businessmen so that they in turn could alert their security personnel to watch for these subjects. The flyer further stated that the persons contained therein had been arrested during 1971 and 1972 and charged with the crime of shoplifting.

On December 12, 1972, the instant action was initiated in the United States District Court for the Western District of Kentucky as a class action, alleging as unconstitutional the distribution of the aforementioned flyers. Furthermore, the Respondent demanded compensatory and punitive damages against the Petitioners. The Respondent based his claim for damages upon the theory that the Petitionrs had deprived him of his constitutional right to privacy. On January 8, 1973, the District Court held a hearing on the Respondent's motion for a preliminary injunction. The District Court thereafter denied the Respondent's motion. On November 16, 1973, the District Court entered its judgment dismissing the Respondent's suit. (See Appendix A).

Subsequently, the Respondent appealed to the United States Court of Appeals for the Sixth Circuit. On October 22, 1974, the Court of Appeals reversed the District Court's judgment and remanded the case for further proceedings (See Appendix B). In so doing, the Court of Appeals held that the Respondent's claim did, in fact, allege a violation of rights guaranteed by the Constitution. It is from the judgment of the Court of Appeals below that the Petitioners make application for a Writ of Certiorari.

REASON FOR GRANTING THE WRIT

I

This Court Should Grant Certiorari to Consider Whether the Court of Appeals Below Erred in Reversing the Judgment of the District Court Below and in Holding That the Distribution by the Petitioners of a Flyer for the Use and Protection of Local Merchants and Business Establishments Entitled "Active Shoplifters" and Containing the Identity of the Respondent, Who Had Been Charged With, But Not Convicted of, the Crime of Shoplifting, Was of Such Grave Magnitude as to Constitute an Invasion of the Civil Rights Secured to the Respondent Under the Constitution and to Require the Invocation of Federal Jurisdiction in Accordance With 42 U.S.C. Section 1983.

The Court of Appeals below held that the actions taken by the Petitioners violated the Respondent's constitutional right of privacy and deprived him of his right to due process guaranteed by the Fourteenth Amendment. The Petitioners respectfully disagree with that ruling. It shall be the Petitioners' contention that the claim advanced by the Respondent constitutes nothing more than a potential tort case for defamation of character or invasion of privacy for which the proper remedy is a civil suit in the state court.

In rendering its decision, the Court of Appeals below relied heavily on this Court's ruling in *Wisconsin* v. *Constantineau,* 400 U. S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971). In that case, this Court, by a six to three majority, held a Wisconsin statute to be unconstitutional which provided that a police chief, among others, could forbid in writing the sale or gift of alcoholic beverages to one who, by excessive drinking, exhibited certain traits. Furthermore, pursuant to that statute, a police chief, without granting any advance notice or opportunity to be heard, caused to be posted in all local retail liquor outlets a notice forbidding sales or gifts of liquor to the appellee.

In short, the *Constantineau* case involved the unconstitutionality of a state statute which deprived a person of any remnant of a due process hearing prior to the taking of official action in accordance with the procedures set forth in the statute. This is quite different from the actions undertaken in the case at bar. Herein, the Petitioners were not directed by any statute, regulation, or ordinance to take any action whatsoever relative to the preparation and dissemination of the flyer in question. They did so independently of any directions or authority. In so doing, they acted alone.

As a result of their independent actions, they may have invaded the Respondent's privacy. They may have defamed him. Their actions may have been tortious in nature. If so (and we certainly do not admit that said acts do constitute any tort), then the Respondent's proper remedy is a civil action for injunctive relief and/or damages in the appropriate state court. The Petitioners respectfuly submit that a person is not entitled to a full due process hearing *before* something of a potentially defamatory nature is said or written about him.

Contrary to the holding of the Court of Appeals below, the Petitioners respectfully urge that their actions did not constitute a violation of the Respondent's constitutionally protected right to privacy. It should be pointed out that our Constitution makes no mention of any specific right of privacy. In fact, it has long been established that one's right of privacy sounds in tort and gives rise to a common law cause of action in its own name. Warren and Brandeis, "Right to Privacy", 4 Harv. L. Rev. 193 (1890).

However, in *Griswold* v. *Connecticut,* 381 U. S. 479, 14 L. Ed. 2d 510, 89 S. Ct. 1678 (1965), this Court acknowledged that a right of privacy could attain constitutional stature in certain limited instances. In *Griswold,* this Court was confronted with a challenge to a state law prohibiting the use of contraceptives by married couples. In holding that statute to be unconstitutional, the Court determined that the "sacred" nature of the marital relationship was imbued with "a right of privacy older than the Bill of Rights". 381 U.S. 479 at 486. Furthermore, the Court concluded that the rights protected in general by the first ten amendments to the Constitution and more specifically by the First, Fourth, Fifth and Ninth Amendments have certain penumbras which create zones of privacy.

The Respondent would have us believe that the actions taken by the Petitioners in the case at bar fall within the zones of privacy recognized in *Griswold.* A similar contention was raised and defeated in *Travers* v. *Paton,* 261 F. Supp. 110 (D.C. Conn. 1966).

In that case, the plaintiff was a convict who contended that the defendants violated his constitutional right of privacy by televising his parole hearing without his prior knowledge or approval. In holding that the defendants' actions did not constitute a violation of the plaintiff's constitutional right of privacy or any other civil rights afforded under 42 U.S.C. Section 1983 the District Court pointed out that the plaintiff's claim more properly sounded in tort law. Furthermore, they ruled that "all torts are not violations of rights secured by the Constitution and laws" and that 42 U.S.C. Section 1983 "encompasses a much narrower field" than the type of action raised by the plaintiff. 261 F. Supp. 110, at 112. In addressing itself to the *Griswold* decision, the District Court in *Travers* stated:

> "It misses the heart and spirit of the *Griswold* case to casually infer an intent to adopt into the Constitution the entire body of the tort law right to privacy." 261 F. Supp. 110, at 113.

To date, only the basic core elements of privacy have been held as clearly protected by the Constitution. (See *Mapp* v. *Ohio,* 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), wherein the Fourth Amendment right to be free from unauthorized searches by police was held applicable to the state by the Due Process Clause of the Fourteenth Amendment; *Rochin* v. *California,* 342 U. S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), holding that one's person is protected against bodily intrusion by means of a stomach pump in that such intrusion "shocks the conscience"; *Roe* v. *Wade,*

410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) holding that the federally protected right of privacy encompassed a woman's decision as to whether she desired to terminate her pregnancy.) To hold that the claim made by the Respondent in the case at bar amounts to a violation of his right to privacy as protected by the Constitution would open the proverbial floodgates of litigation to virtually all types of tort actions sounding in defamation of character or invasion of privacy.

Federal jurisdiction under 42 U.S.C. Section 1983 attaches as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Actions for defamation do not come within the purview of 42 U.S.C. Section 1983. *Jervey* v. *Martin,* 336 F. Supp. 1350 (W.D. Va. 1972). Where only an invasion of a general personal right to privacy is warranted under the facts, the Respondent cannot rely upon the Constitution as the source of that right in an attempt to plead his way into the jurisdiction of the federal courts.

> "There are many individual rights which are not guaranteed by the Constitution of the United States. Protection of those rights is the duty of the State . . . these include the right to be secure from intentional and unintentional harm to a person's reputation and property. The fact that such rights are violated by policemen does not spell out Federal Constitutional violations." *Johnson* v. *Hackett,* 284 F. Supp. 933, at 939 and 940 (E.D. Pa. 1968).
>
> ". . . the protection of a person's *general* right to privacy—his right to be left alone by other people—is like the protection of his property and his very life, left largely to the law of the individual states." *Katz* v. *United States,* 389 U. S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967).

In a case somewhat similar to the one at bar, the Ninth Circuit held that the plaintiff failed to allege facts which, if proven, would establish that he had been deprived of any right secured by the Constitution. *Baker* v. *Howard,* 419 F. 2d 376 (9th Cir. 1969). In that case, the actions of the defendant police officers went further than the actions of the Petitioners herein. After investigating a "suspicious incident" involving the appellant in that case, which apparently did not result in any arrest, the police officers released statements to a local radio station indicating that the appellant therein had committed a crime. The radio station, also a party defendant, then broadcast the reports to the community at large. The combined police and radio station conduct directly resulted in the loss of the appellant's teaching position. The Ninth Circuit upheld the District Court's dismissal of the case due to a failure to state a claim under either 42 U.S.C. Sec-

tion 1983 or 28 U.S.C. Section 1343. In so doing, the Circuit Court held:

> "Under some circumstances, there can be such a gross abuse of privacy as to amount to an abridgement of fundamental constitutional guarantees . . . but the invasion of privacy here complained of is not, in our opinion, so flagrant that it calls for the invocation of the Constitution." 419 F. 2d 376, at 377.

The acts of the police officers in *Baker,* if true as alleged, were far more potentially determinental to that plaintiff than the Respondent in the case at bar. In the instant case, the allegedly damaging information was disseminated in a limited number of pamphlets listing the Respondent as one of a number of "Active Shoplifters". In *Baker,* the dissemination of the defamatory information occurred over a vast communication media aimed at the entire community at large. Further, in *Baker,* the plaintiff was deprived of his job. No such loss is alleged by the Respondent in the instant case. If the actions in *Baker* did not give rise to the invocation of rights protected by the Constitution and/or the jurisdiction of the Federal Courts granted under 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343, then it seems unreasonable to extend said rights and protections to the claims asserted by the Respondent herein. As pointed out by the decision of the District Court below in the instant case:

> "Even if the police departments fail to use the proper caution in screening their records, the acts complained of, as in *Baker,* supra, are not, under

> the particular circumstances, sufficient to invoke the Constitution. The facts alleged in this case do not establish that plaintiff has been deprived of any right secured to him by the Constitution of the United States."

CONCLUSION

It is respectfully submitted that this Court should grant certiorari to review the erroneous judgment of the Court of Appeals below.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 7502-B

EDWARD CHARLES DAVIS, III - - - *Plaintiff*

v.

EDGAR PAUL, Chief of Police, Louisville Division of Police, and
RUSSELL MCDANIEL, Chief of Police, Jefferson County Police - - - - - - *Defendants*

MEMORANDUM AND ORDER

This is an action brought under 28 U.S.C. §1343(3) and (4) and 42 U.S.C. §1983 to redress the alleged violation of plaintiff's right of privacy as protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States. The defendants, pursuant to Rule 12(b), Federal Rules of Civil Procedure, have moved to dismiss the plaintiff's complaint on the grounds that this Court lacks jurisdiction over the subject matter and that the plaintiff has failed to state a claim upon which relief can be granted.

Plaintiff contends that his constitutionally protected right of privacy has been violated by the acts of the Louisville and Jefferson County Police Departments. The acts complained of are the dissemination by the named police departments of flyers containing the names and pictures of

persons the departments arrested for shoplifting during 1971 and 1972. Although plaintiff was arrested in 1971 as a suspected shoplifter, he contends that since he was never convicted of the charge, his right of privacy was violated by the dissemination of the flyers, containing his name and picture and entitled "active shoplifters", to local businessmen and merchants.

Plaintiff argues that the defendants acted under color of state law and in so doing have violated his rights, privileges and immunities protected under the Constitution. 42 U.S.C. §1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The question which this Court must consider is whether the defendants have violated any constitutionally protected rights, privileges, or immunities of this plaintiff which would give the Court jurisdiction over this matter.

The leading case on this question of the constitutional right of privacy is *Griswold* v. *State of Connecticut,* 381 U. S. 479, 89 S. Ct. 1678 (1965) which involved the challenge of a state law prohibiting the use of contraceptives. The Court held the statute unconstitutional; however, it proffered several different reasons for the decision. The majority opinion recognized that the Constitution does not explicitly mention a right of privacy, but theorized that the rights protected by the first ten amendments have "penumbras" which create "zones of privacy" in which the marital

relationship is included. A concurring opinion in that case classified marital privacy as a "fundamental right" protected by the Ninth Amendment. The Court alluded that it felt the marital sexual relationship is a special situation and is private by nature. See *United States* v. *Laub Baking Co.,* 283 F. Supp. 217 (1968).

In *Travers* v. *Paton,* 261 F. Supp. 110 (1966), the Court dealt with the question of whether the televising of a parole hearing was a violation of the plaintiff's civil rights under 42 U.S.C. §1983 and held that it was not. The Court there pointed out that "all torts are not violations of rights 'secured by the Constitution and laws'. The statute encompasses a much narrower field". In order for the statute (42 U.S.C. §1983) to apply, there must be an act in violation of the Constitution or a federal law. See *Bomar* v. *Keyes,* 162 F. 2d 136 (2nd Cir., 1947). The Court went further and commented on *Griswold,* supra, stating:

> "It misses the heart and spirit of the Griswold case to casually infer an intent to adopt into the Constitution the entire body of the tort law right of privacy."

In *Baker* v. *Howard,* 419 F. 2d 376 (9th Cir., 1969), a case similar to the one at bar, the Court held that there was no violation of any Constitutionally secured right of privacy. The defendant police officers, after investigating a "suspicious incident" involving plaintiff and concluding that no crime had been committed, deliberately released to a broadcasting company a police report containing "libelous and false statements" suggesting that plaintiff had committed a crime. The Court held that the complained invasion of plaintiff's privacy was not so flagrant as to invoke the Constitution.

The Court, in *Mapp* v. *Ohio,* 367 U. S. 643, 81 S. Ct. 1684 (1961), held that the Fourth Amendment to the Constitution secured only the basic core aspects of privacy and

through the Fourteenth Amendment have been held applicable to the states by the due process clause. The Court held, however, that this core of privacy was fundamental in nature, such as the right to be secure in one's home against violent intrusion by the police.

Thus, it appears that constitutional protection of the right of privacy does not extend to all possible ramifications of privacy but must be scrutinized carefully to not indiscriminately extend federal jurisdiction over state torts under the protection of §1983.

In the present case, the dissemination of the flyers was not to the public at large but only to businessmen and merchants in the community in order for them to distribute the information to their security personnel to help them identify possible shoplifters. See *Tosh* v. *Buddies Supermarkets, Inc., et al.*, 482 F. 2d 329 (5th Cir., 1973). Even if the police departments failed to use the proper caution in screening their records, the acts complained of, as in *Baker*, supra, are not, under the particular circumstances sufficient to invoke the Constitution. The facts alleged in this case do not establish that plaintiff has been deprived of any right secured to him by the Constitution of the United States.

WHEREFORE, IT IS ORDERED AND ADJUDGED that the plaintiff's complaint be and is hereby dismissed, at the cost of plaintiff.

Judgment shall be entered accordingly.

This 16th day of November, 1973.

(s) Rhodes Bratcher
United States District Judge

Copies to:
Counsel of record.

APPENDIX B

No. 74-1225

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EDWARD CHARLES DAVIS, III, - *Plaintiff-Appellant,*

v.

EDGAR PAUL, Chief of Police, Louisville Division of Police, and
RUSSELL MCDANIEL, Chief of Police, Jefferson County Police, - - - *Defendants-Appellees.*

Appeal From the United States District Court For the Western District of Kentucky.

Decided and Filed October 22, 1974.

Before: PHILLIPS, Chief Judge, and CELEBREZZE and ENGLE, Circuit Judges.

PHILLIPS, Chief Judge. Appellant, Edward Charles Davis, III, brought this class action under 42 U.S.C. §1983 alleging that the distribution by the Chiefs of Police of the Louisville and Jefferson County Police Department of a flyer captioned "Active Shoplifters" and containing the names and mugshots of persons who have never been convicted of shoplifting violated the Due Process Clause of

the Fourteenth Amendment. Appellant seeks declaratory, injunctive and monetary relief. The District Court dismissed the complaint, holding that it did not allege any violation of rights guaranteed by the Constitution. We reverse.

The complaint asserts that on June 14, 1971, Edward Charles Davis, III, was arrested in Louisville, Kentucky, on a charge of shoplifting. It is alleged, and attachments to the complaint show, that he entered a plea of not guilty and that the charge was "filed away" on September 21, 1971, and dismissed on December 11, 1972. It is further alleged that appellant is innocent of the charge and that he was never tried or convicted of the offense.

The complaint alleges that on December 5, 1972, Col. Edgar Paul, Chief of Police of the Louisville Division of Police, and Col. Russell McDaniel, Chief of Police of the Jefferson County Police (hereinafter Police Chiefs), caused to be sent flyers to numerous merchants and business establishments in the Louisville Metropolitan area. It is alleged, and attachments to the complaint show, that the flyers contained the names and mugshots of persons who had been arrested for shoplifting during 1971 and 1972 or who were active in various criminal fields in high density shopping areas, that each flyer was headed by the caption "Active Shoplifters" and that the stated purpose of the flyer was to allow the merchants to inform their security personnel "to watch for these subjects."[1] Appellant's name and mugshot were included in the flyer. It is alleged that the acts of the Police Chiefs were under color of

[1]At the hearing on the motion for a preliminary injunction, Col. Paul testified that this practice had been going on about fifteen years, that the sole justification for including a person in the flyer is the fact of an arrest and information supplied by the arresting officer, that appellant's only prior arrest was in 1967 for a speeding violation and that about 800 of the flyers had been distributed.

the state law and deprived the appellants and other similarly situated of rights guaranteed by the Due Process Clause of the Fourteenth Amendment.

The Police Chiefs moved to dismiss for lack of subject matter jurisdiction. The District Court dismissed the complaint stating: "The facts alleged in this case do not establish that plaintiff has been deprived of any right secured by the Constitution of the United States."

On considering an appeal from an order granting a motion to dismiss, we must, of course, take the allegations in the complaint as true. *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508, 515-16 (1972).

Before recovery can be allowed under §1983, two elements must be present.

> "First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.'" (Footnote omitted) *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 150 (1970).

The sole issue on appeal, as it was in the District Court, concerns the first two elements set forth in the preceding paragraph. Specifically, the Police Chiefs contend that the complaint only states a cause of action for defamation and does not establish a constitutional deprivation.[2] Ap-

[2]"It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked" *Monroe* v. *Pape,* 365 U.S. 167, 183 (1961).

pellant contends that the complaint sets forth facts showing a deprivation of due process as guaranteed by the Fourteenth Amendment. Specifically, appellant contends that the Due Process Clause prohibits the Police Chiefs from disseminating "to large segments of the public, flyers containing the names and photographs of persons who have been arrested for, but not convicted of, the offense of shoplifting and describing these persons as 'active shoplifters,' together with persons who have been convicted of the offense." At oral argument, counsel for appellant stressed that the heart of the deprivation was the use of the label "active shoplifter."

We are of the view that appellant has set forth a claim cognizable under §1983 in that he has alleged facts that constitute a denial of due process of law. This holding is mandated in view of *Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971).

In *Constantineau,* the question presented to the Supreme Court involved the constitutionality of a Wisconsin statute which provided that designated persons could in writing forbid the sale or gift of intoxicating liquors to excessive drinkers who exhibited specified traits or produced described conditions. The statute did not provide for notice and hearing. The Chief of Police, pursuant to the statute and without notice or hearing, caused to be posted a notice at all retail liquor outlets in the town that sales or gifts of liquor to Constantineau were forbidden for one year. The precise issue presented to the Court was "whether the label or characterization given a person by 'posting,' though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard." 400 U. S. at 436. In holding that due process was required, the Court stated:

> "Yet certainly where the State attaches 'a badge of infamy' to the citizen, due process comes into play.

Wieman v. *Updegraff,* 344 U. S. 183, 191. '[T]he right to be heard before being condemned to suffer grevious loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 168 (Frankfurter, J., concurring).

> "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. 'Posting' under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." 400 U. S. at 437.

In the teeth of the plain language of the Court's holding, the Police Chiefs seek to distinguish *Constantineau* on the basis of an artificial distinction between "liberty" and "property" rights. It is contended that the thrust of the holding was based on the denial of a property right, i.e., the ability to purchase liquor. We do not read the opinion of the Supreme Court to support any such distinction. The Court has rejected the distinction between interests in "liberty" and "property" in the context of a due process deprivation. *Board of Regents* v. *Roth,* 408 U. S. 564, 569-75 (1972); *Perry* v. *Sindermann,* 408 U. S. 593, 599 (1972).

In *Roth,* the Court reaffirmed its holding in *Constantineau* and emphasized that when interests in liberty are involved, due process is required. Although the Court did not

undertake to define liberty in precise terms, it was stated that its meaning must "[w]ithout doubt, . . . [denote] not merely freedom from bodily restraint," and "must be broad indeed." 408 U.S. at 572. There is no question that the acts complained of in the case at bar constitute a denial of an interest in liberty. As stated by the Court in *Roth:*

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' *Wisconsin* v. *Constantineau,* 400 U. S. 433, 437. *Wieman* v. *Updegraff,* 344 U. S. 183, 191; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123; *United States* v. *Lovett,* 328 U. S. 303, 316-317; *Peters* v. *Hobby,* 349 U. S. 331, 352 (DOUGLAS, J., concurring). See *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's 'good name, reputation, honor, or integrity' is at stake.
>
> "Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." (Footnote omitted.) 408 U.S. at 573.

In the case at bar, appellant alleges that he and others have been branded as active shoplifters—common criminals

—and grouped together with those who have been convicted of crimes. This label carries with it the badge of disgrace of a criminal conviction. Moreover, it is a direct statement by law enforcement officials that the persons included in the flyer are presently pursuing an active course of criminal conduct. All of this was done without the slightest regard for due process. There was no notice nor opportunity to be heard prior to the distribution of the flyer, and appellant and others have never been accorded the opportunity to refute the charges in a criminal proceeding. It goes without saying that the Police Chiefs cannot determine the guilt or innocence of an accused in an administrative proceeding. Such a determination can be made only in a court of law.

The harm is all the more apparent because the branding has been done by law enforcement officials with the full power, prestige and authority of their positions. There can be little doubt that a person's standing and associations in the community have been damaged seriously when law enforcement officials brand him an active shoplifter, accuse him of a continuing course of criminal conduct, group him with criminals and distribute his name and photograph to the merchants and businessmen of the community. Such acts are a direct and devastating attack on the good name, reputation, honor and integrity of the person involved. The fact of an arrest without more may impair or cloud a person's reputation. *Michelson* v. *United States,* 335 U.S. 469, 482 (1948). Such acts on the part of law enforcement officials may result in direct enocomic loss and restricted opportunities for schooling, employment and professional licenses. *Menard* v. *Mitchell,* 430 F. 2d 486, 490 (D.C. Cir. 1970).

In the present case, appellant was a photographer for the Louisville-Courier Journal at the time of the flyer's dissemination. At the hearing on the motion for a preliminary injunction, his supervisor testified as follows:

> "Our photographers must be accepted as a reasonably honorable and truthful man wherever they go. I felt that in view of this flyer's circulation to merchants of the community I could not, for example, assign Mr. Davis to photographing anything in a merchantile establishment and so that should such an assignment come up I would have been forced to have someone else cover that assignment rather than Mr. Davis."

His supervisor also stated appellant "had best not find himself in a similar situation" again and that he would "view very seriously" a subsequent arrest.

"The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense." (Footnote omitted.) *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 241 (1957). In *Schware* the Court found a denial of due process when a state denied an applicant a license to practice law based on reasons that had no probative value. *Id.* at 246-47. Part of the Board's evidence was based on prior arrests for which the applicant had never been tried or convicted. *Id.* at 241-43.

Similarly, law enforcement officials cannot, consistent with the Due Process Clause, brand a person as an active shoplifter when he has never been tried for the offense. There is no rational basis to presume guilt and active criminality from the mere fact of an arrest. While "[p]rocedure by presumption is always cheaper and easier than individualized determination," it cannot stand when it results in the deprivation of a protected interest without a meaningful opportunity to rebut the presumption. *Stanley* v. *Illinois,* 405 U.S. 645, 656-57 (1972).

Few things are as fundamental to our legal system as the presumption of innocence until overcome by proof of guilt

beyond a reasonable doubt at a fair trial. The dissemination of the flyer in the case at bar is in the face of the presumption of innocence, disregards the Due Process Clause and is based on evidence that is not probative of guilt.

Condemning a man to a suspect class without a trial and on a wholly impermissible standard, as in the case at bar, offends the very essence of the Due Process Clause, i.e., protection of the individual against arbitrary action. *Slochower* v. *Board of Education,* 350 U.S. 551, 559 (1956); *Peters* v. *Hobby,* 349 U.S. 331, 351-52 (1955) (Douglas, J., concurring.) As said by Mr. Justice Black in his concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 144-45 (1951):

> "Our basic law, however, wisely withheld authority for resort to executive . . . condemnations and blacklists as a substitute for imposition of legal types of penalties by courts following trial and conviction in accordance with procedural safeguards of the Bill of Rights." (Footnote omitted.)

Reversed and remanded for proceedings not inconsistent with this opinion.

CERTIFICATE OF SERVICE

I, J. Bruce Miller, one of the attorneys for Russell McDaniel, Petitioner herein, acting on behalf of all counsel for both Edgar Paul and Russell McDaniel, and being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 20th day of January, 1975, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on Edward Charles Davis, III, Respondent, by mailing copies in duly addressed envelopes, with first class postage prepaid, to his respective attorneys of record, as follows:

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